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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 690

AMERICAN INTERNATIONAL ALUMINUM CORP.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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UNITED STEELWORKERS OF AMERICA, AFL-CIO,
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Petition For a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

Petitioner, American International Aluminum Corp., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 9, 1964.

CITATIONS TO OPINIONS BELOW

No opinion was filed by the District Court; its order is printed in Appendix B hereto, infra, page 3.

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, page 4, is reported in 334 F.2d 147.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 9, 1964. R. 114 and page 4, infra.

Timely petition for rehearing was filed on July 28, 1964. Rehearing was denied on August 19, 1964, without opinion, R. 125.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I.

WHERE A COLLECTIVE BARGAINING AGREEMENT CONTAINS A NO-STRIKE, NO-SLOWDOWN CLAUSE WHICH IS EXPRESSLY DECLARED TO BE NOT WITHIN THE SCOPE OF THE GRIEVANCE-ARBITRATION PROCEDURES AND THE EMPLOYEES AND UNION BREACH THE AGREEMENT BY ENGAGING IN A SLOWDOWN AND ENGAGING IN UNLAWFUL ACTIVITIES, DOES THE EMPLOYER HAVE A RIGHT TO TERMINATE THE COLLECTIVE BARGAINING AGREEMENT AND NOT HAVE TO ARBITRATE SUBSEQUENT DISCHARGES OF THE EMPLOYEES.

II.

IS THE DETERMINATION OF THE ABOVE ISSUE PART OF A DETERMINATION NECESSARY TO COMPREHEND THE SCOPE OF, AND END OF, THE AGREEMENT TO ARBITRATE, OR OTHERWISE A MATTER TO BE DETERMINED BY THE COURT; OR ARE THE ISSUES TO BE REFERRED TO AN ARBITRATOR FOR DETERMINATION.

III.

WHETHER IN A SUIT FOR SPECIFIC PERFORMANCE OF AN ARBITRATION PROVISION, THE DISTRICT COURT JUDGE MAY, IN THE EXERCISE OF HIS DISCRETION, DEFER ORDERING ARBITRATION, CONSIDERING, INTER ALIA, THAT THE DISPUTE INVOLVING THE SAME PARTIES, OVERLAPPING ISSUES, AND A FULL AND EQUAL REMEDY IS SCHEDULED FOR IMMEDIATE HEARING BEFORE A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD, AND CONSIDERING FURTHER THAT THE NATURE OF THE INSTANT CONTROVERSY (PROOF OF SLOWDOWN) NECESSARILY WILL INVOLVE A VERY EXTENSIVE LENGTH OF TIME FOR ANY ADJUDICATION, MUCH LESS A DUAL ADJUDICATION.

STATUTE INVOLVED

The statutory provision involved is Section 301, Labor Management Relations Act, as amended, 1959, 29 U.S.C. Section 185, printed in Appendix A, infra, page

STATEMENT

The United Steel Workers of America, A.F. of L., C.I.O. (Hereinafter called respondent or the union) filed a complaint in the United States District Court for the Southern District of Florida against American International Aluminum Corporation (hereinafter called the petitioner or the company) seeking a judgment requiring petitioner to submit the issue of petitioner's discharge of its employees (and certain other grievances) to arbitration.

The complaint, filed December 5, 1963, alleged a collective bargaining agreement between the parties which by its terms would expire December 19, 1963.

The complaint contained further allegations as follows:

(a) On or about August 28, 1963, petitioner informed respondent that the agreement was terminated;

(b) At the same time petitioner ordered its employees who were members of respondent organization out of its plant and informed said employees that they were discharged;

(c) At the time of the discharge six grievances had been processed and were awaiting final disposition;

(d) The respondent requested petitioner to arbitrate the issue of discharge as well as the grievances.

A copy of the collective bargaining agreement was attached to the complaint as Exhibit A. The agreement provided for the handling of grievances. If the grievance was not settled through conference the controversy might be submitted to arbitration. The Agreement contained a provision to the effect that the union shall not itself nor shall it permit or sanction its members to take part in any strikes, picketing, stoppages or slowdowns of work, sit-downs, stay-ins or other curtailment or restriction of production or interference with work in or about the company plants or premises. It further provided that the company shall not cause or engage in any lockout provided the union and/or the employees comply with the provision against strikes, slowdowns, etc above referred to. The employees' duty not to strike or slow down work and the petitioner's duty not to lock out its employees were specifically excluded from the grievance-arbitration clauses and procedures of the agreement.

Petitioner filed a motion to dismiss the complaint and submitted to the trial judge a brief in support thereof.

Petitioner's brief in support of its motion to dismiss brought out that on August 29, 1963, ninety-eight days before the respondent filed its complaint in the District Court, it filed a charge before the NLRB involving the same matters. The brief attached copies of the charge, the Complaint issued by the NLRB and the petitioner's Answer to the charge and Complaint. The petitioner in its brief pointed out that all of said pleadings filed before the NLRB ante-dated respondent's filing of its complaint

in the District Court. The proceeding before the NLRB was pending at all times herein material.

The Answer which this petitioner filed in the NLRB proceedings made it clear that this petitioner did not discharge any of its employees until after it terminated the contract because of respondent's breach.

The petitioner first made its position known to the respondent by a telegram sent to respondent on August 28, 1963 which alleged as follows:

> "Please be advised that the Company considers the collective bargaining agreement to have been breached by the repeated slowdowns and other unprotected activities of the employees and union STOP as a result the Company finds it impossible to operate profitably or efficiently and is compelled to exercise its right to terminate and rescind the collective bargaining agreement STOP please get in touch with the Company immediately upon receipt of this telegram."

On August 30, 1963 the respondent sent the following telegram to the employees:

> "Because of the most recent slow down engaged in by the Union and employees, the company was compelled to temporarily close the plant and terminate the Union contract. The Company also is compelled to remove all participants, including yourself, from the company payroll."

The District Judge considered the complaint filed be-

fore him, the pleadings which were pending before the NLRB as well as arguments of counsel. He thereupon made the following ruling:

> "This cause came on for hearing on Defendant's Motion to Dismiss Complaint, on matters of record, and the briefs, arguments and statements of respective counsel for the parties, and it appearing to the Court that the parties are in substantial agreement as to the pertinent facts regarding the Complaint herein and the pendency of a complaint, shortly set for hearing, before the National Labor Relations Board upon Plaintiff's charges filed therein, upon due consideration whereof the Court finds and determines that in the exercise of its discretion its jurisdiction over the subject-matter should not be exercised at this time or until said matters and issues now before said Board have been finally adjudicated; it is therefore,
>
> ORDERED, ADJUDGED AND DECREED that Defendant's Motion to dismiss Complaint for specific performance be, and the same is hereby granted.
>
> DONE AND ORDERED in Chambers, at the United States Courthouse, Miami, Florida, on January 20, 1964.

On appeal the United States Court of Appeals, 5th Circuit reversed and remanded the cause for the entry of orders appropriate to and proceedings consistent with the opinion of that court.

The 5th Circuit's ruling is divisible into three parts.

First, the Court held that under **Local Union No. 721 v. Needham Packing Co.** (1964) —— U.S. ——, 84 S. Ct. 773, 11 L.Ed. 2d 680, the employer was still bound to arbitrate the union's claim that the employees had been wrongfully discharged notwithstanding the employer's contention that the union and employees breached the agreement by violating the no-slowdown clause.

Second, the Court held that the union's claim that the employees were wrongfully discharged must be submitted to arbitration even though the evidence before the trial judge was to the effect that the employer did not discharge any employees until after it terminated the collective bargaining agreement.

Third, the Court held that even though in certain circumstances primary jurisdiction of the NLRB of a particular controversy would forbid the commencement or continuation of a suit at law under Sec. 301, L.M.R.A., this case did not present such a prohibition.

REASONS FOR GRANTING THE WRIT

Since the petitioner construes the proper purpose of a Petition for Certiorari to be to point out to the Court the significant broad public policy interests which are involved in the case for review, the petitioner hereafter briefly points out those errors of the Court below which have prevented the holding of the instant case from contributing to that body of substantive law which would declare and clarify these public policy matters.

1. The Court cited the Needham Packing Co. case[1] in support of its position that the employer was still bound to arbitrate the union's claim that the employees had been wrongfully discharged even though the union breached the agreement by violating the no-slowdown clause. In the Needham case the no-strike, no-slowdown clause was not excepted from arbitration as it was in the instant case. This is made patently clear by the following language of the Court:

> "Nothing in the agreement indicates an intention to except from Needham's agreement to arbitrate disputes concerning the interpretation or application of the agreement and any dispute which involves or follows an alleged breach of the no-strike clause."

The difference between the Needham case and the instant case is furthermore made apparent by this Court's discussion in Needham of the Drake Bakeries case[2] where this Court stated the following:

> "Although the Court relied in part on the employer's apparent intention not to terminate the contract altogether more central to its conclusion was the view there was no inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation."

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[1](1964) —— U.S. ——, 84 S.Ct. 773, 11 L.Ed. 2d 680.
[2]Drake Bakeries, Inc. v. Local 50, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed. 2d 474.

In Needham this Court quoted from Drake Bakeries as follows:

> "Under this contract by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes."

It is obvious that in Drake Bakeries and in Needham the employer was contending that a union's breach of a no-strike clause would alleviate his having to arbitrate. The Court did not accept this proposition. In this case, however, the employer took the precaution of writing into his collective bargaining agreement a clause that specifically excluded the duty to arbitrate no-strike, no-slowdown and lock-out activities.

2. The lower Court's announcement in the instant case that arbitration may be had after termination of the contract and its citation of **United Steelworkers vs. Enterprise Wheel**[3] and **Wiley**[4] demonstrates the inadequacy of the declared federal substantive law to resolve the issues of the instant case. It is true those cases hold that arbitration may be had after termination of the contract, but in those cases, there was not any question concerning the employer's right to terminate.

3. The 5th Circuit decided that the pendency of the

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[3](1963) 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424.

[4]John Wiley & Sons, Inc. v. Livingston (1964) —— U.S. ——, 84 S.Ct. 909, —— L.Ed. 2d ——.

unfair labor practice charge before the Labor Board would not afford any basis for the trial judge's exercise of his discretion in not ordering arbitration until the Labor Board had finally adjudicated matters pending before it. However, the trial Court, as is indicated by the record, took matters into consideration other than the mere concurrent pendency of the subject matter. The trial court, in its order, cited some of the considerations which entered into its exercise of discretion:

> ". . . and it appearing to the Court that the parties are in substantial agreement as to the pertinent facts regarding the complaint herein and the pendency of a complaint, shortly set for hearing, before the National Labor Relations Board upon plaintiff's charges filed therein, upon due consideration whereof the Court finds and determines that in the exercise of its discretion, its jurisdiction over the subject matter should not be exercised at this time . . ."

The 5th Circuit's opinion did not in any way, indicate that the trial Court abused its discretion; nor does its opinion in fact, even discuss the question of discretion. The Court below was satisfied to base its determination upon cases having to do with jurisdiction. **Smith** v. **Evening News Association** (1962) 371 U.S. 195, 197, 83 S. Ct. 267, 9L.Ed. 2d 246; **Carey** v. **Westinghouse Electric Corp.** (1964) 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed. 2d 320; **Lodge No. 12** v. **Cameron Iron Works,** 5th Cir. 1958, 257 F. Ed. 467, 472-73.

The effect of the Fifth Circuit's reversal is to do

away with a court's discretionary powers in these equitable matters. The Fifth Circuit's language which we quote below establishes a rigid rule which would eliminate the trial judge's consideration of such matters as costs or inconvenience:

"So far as cost or inconvenience of producing like or similar evidence before the arbiter is concerned, no policy defined in the Labor Act affords any immunity to the parties to an arbitration agreement."

The afore-quoted passage reveals the Court's focus upon the policies of the LMRA and its failure to focus upon its obligations under **Lincoln Mills.**[5] The semble of the Fifth Circuit's holding is in complete contradiction to this Court's pronouncement in the **Lincoln Mills** case that the courts will create a body of substantive case law in this field. Further, its failure to determine the employer's right to terminate is likewise diametrically opposed to this court's pronouncement in Wiley that it is for the court to determine whether or not a party is obligated to arbitrate the matter in dispute.

It is for clarification and guidance that we seek Certiorari in this case.

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[5](1957) 353 U.S. 525, 69 S.Ct. 251, —— L.Ed. 2d ——.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Emanuel Levenson

Counsel for Petitioner

Dated: November 6, 1964.
Of Counsel:
Herbert B. Mintz

APPENDIX A

Section 301, LMRA (29 U.S.C. Section 185):

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

Order of the District Court:

ORDER GRANTING MOTION TO DISMISS

(Number and Title Omitted)

Filed: Jan. 24, 1964

This cause came on for hearing on Defendant's Motion to Dismiss Complaint, on matters of record, and the briefs, arguments and statements of respective counsel for the parties, and it appearing to the Court that the parties are in substantial agreement as to the pertinent facts regarding the Complaint herein and the pendency of a complaint, shortly set for hearing, before the National Labor Relations Board upon Plaintiff's charges filed therein, upon due consideration whereof the Court finds and determines that in the exercise of its discretion its jurisdiction over the subject-matter should not be exercised at this time or until said matters and issues now before said Board have been finally adjudicated; it is therefore,

ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Complaint for specific performance be, and the same hereby is, granted.

DONE AND ORDERED, in Chambers, at the United States Courthouse, Miami, Florida, on January 20, 1964.

(Signed) EMETT C. CHOATE
United States District Judge

Opinion of the United States Court of Appeals for the Fifth Circuit:

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 21406

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Appellant,

versus

AMERICAN INTERNATIONAL ALUMINUM CORP.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 9, 1964.)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

BROWN, Circuit Judge: The question here is whether the District Court properly dismissed the complaint brought by the Union[1] under § 301, 29 USCA §185, to compel the Employer to arbitrate a number of grievances, the principal one being the discharge of all employees after a lockout. We think none of the reasons

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[1]United Steelworkers of America, AFL-CIO.

advanced by the Employer or adopted by the District Court justify denial of arbitration. We therefore reverse.

The facts for our purposes may be severely capsulated. The collective bargaining contract agreement ran to December 19, 1963. During its term, on August 28, 1963, the Employer, claiming that the Union and its members had been guilty of slowdowns expressly prohibited by the Agreement, instituted a lockout by shutting down the plant. For like reasons it declared the contract to be terminated. Two days later, August 30, the Employer advised each employee by telegram that his employment had been terminated. This was tantamount to a discharge. Despite repeated efforts by the Union to confer about the lockout and discharges, the Employer purposefully declined to discuss the matter or process the grievance concerning the asserted wrongful discharge.[2]

To the Union's complaint in court, the Employer responded with a motion to dismiss on the grounds that "1. This court does not have jurisdiction of this case," and "2. The complaint does not state a claim against defendant upon which relief can be granted." Actually, however, the Court, as do we, considered it, at least in part, as a motion for summary judgment since the motion to dismiss incorporated by reference the "brief in support of motion to dismiss complaint." This brought in considerable factual material as to proceedings before the National Labor Relations Board, F.R.Civ.P. 12(b),

[2] Also pending were routine grievances 69 through 74 which had been initiated prior to the purported unilateral termination of the contract on August 28.

56(e), including the charge, complaint and answer before the Labor Board. Charging a variety of violations the complaint contained only one dealing with the discharge of August 28-30 as such.[3]

The motion to dismiss, as thus expanded, asserted primarily that exclusive jurisdiction over the subject matter of this controversy was with the Labor Board. In addition, the Employer urged that arbitration should not be ordered since the collective bargaining agreement had been terminated for good cause by the Employer. Assuming continuance of the collective bargaining agreement, the Employer also claimed that the Union had failed to comply with the procedural conditions precedent to arbitration and in any event, the asserted grievance was expressly excluded from arbitration by the contract.

On this motion, as expanded, the District Court, without illumination by any opinion, entered an order which "ordered, adjudged and decreed that [the Employer's] Motion to Dismiss Complaint for specific performance, be and the same hereby is, granted."[4] The brief

[3]It charged a number of violations, 29 USCA §8(a)(1), (a) publishing a plant rule against circulation of petitions, (b) publishing a rule requiring cooperation with interrogation of employees, (c) unlawful interrogation of employees by counsel concerning protected activities; and also §8(a)(5) failure to bargain by (a) cancelling existing contract, (b) refusing to meet with Union representatives, (c) refusing to reinstate employees to derogate Union leadership, (d) humiliating treatment of Union representatives to disparage their standing; and §8(a)(1) and (3) for discharging the employees and refusing thereafter to reinstate them.

[4]This order was dated January 20, 1964. Notice of appeal was given February 18, 1964. There was no other order entered. It put an end to the case. The Union was entitled to treat the dismissal as final, which it did. It was not required to formally disclaim any right to file an

order had first recited that "the parties are in substantial agreement as to the pertinent facts concerning the Complaint herein and the pendency of a complaint" before the Labor Board, and that upon consideration thereof "the Court finds and determines that in the exercise of its discretion its jurisdiction over the subject-matter should not be exercised at this time or until said matters and issues now before said [Labor] Board have been finally adjudicated."

As we ought not to express any views on the asserted competition between court-ordered arbitration and Labor Board proceedings unless arbitration is otherwise apparently demanded, we think it appropriate first briefly to dispose of the Employer's contention as to arbitrability.

The assertion of a failure to comply with the procedural conditions precedent fails for two reasons. First, and probably foremost, the Supreme Court approves the view we have previously expressed[5] that "once it is determined" as we do next, "that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and

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amended complaint. Nothing in Erstling v. Southern Bell Tel. and Tel. Co., 1958, 5 Cir., 255 F.2d 93; Black v. First National Bank, 5 Cir., 1958, 255 F.2d 373; Williams v. Peters, 9 Cir., 1956, 233 F.2d 618; Bland v. Hartman, 9 Cir., 1957, 245 F.2d 311, 313, supports the Employer's contention that the order of January 20, 1964, was not final and appealable.

[5]Deaton Truck Line, Inc. v. Local Union 612, 5 Cir., 1962, 314 F.2d 418, 422, was cited as representative of the Fifth Circuit view which the Supreme Court adopted. See also International Union, U.A.W. v. Daniel Radiator Corp., 5 Cir., 1964, 328 F.2d 614.

bear on its final disposition should be left to an arbitrator." *John Wiley & Sons v. Livingston*, 1964, ___ U.S. ___, ___ S.Ct. ___, 11 L.Ed.2d 898, 909. And second, as we have many times held, when the Employer has made it as clear as it has here, that under no circumstances will it recognize the right to arbitration sought by the Union, the Union need not go through perfectly useless formalities to set the wheels in motion. *International Ass'n Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F.2d 238, 5 Cir., 1963, 316 F.2d 90; *Southwestern Elec. Power Co. v. Local Union No. 738*, 5 Cir., 1961, 293 F.2d 929.

The other procedural contention, that arbitration may not be had after termination of the contract, warrants no discussion ever since *United Steelworkers v. Enterprise Wheel & Car Corp.*, 1963, 363 U.S. 593, 83 S.Ct. 1358, 4 L.Ed.2d 1424; cf. *John Wiley & Sons, Inc. v. Livingston*, 1964, ___ U.S. ___, ___ S.Ct. ___, 11 L.Ed.2d 898.

That leaves two remaining assertions as to non-arbitrability. The first, stated variously, is that the Union, by engaging in a slowdown in violation of the no strike and anti-slowdown clause somehow repudiated the collective bargaining agreement so that the company had a right, which it concededly claimed to exercise, to "terminate" the agreement. That notion has likewise been put to rest by the recent decision in *Local Union No. 721 v. Needham Packing Co.*, 1964, ___ U.S. ___, ___ S.Ct. ___, 11 L.Ed.2d 680. Paraphrasing it, the Employer's " * * * allegations by way of defense * * * that the union breached

the no-strike clause * * * did not release [the Employer] from its duty to arbitrate the union's claim that employees had been wrongfully discharged."[6]

The second contention, that the collective bargaining contract excluded this grievance from arbitration, is similarly unfounded. It is true, as urged, that the contract did purposefully exclude certain matters from the grievance machinery. The exclusion is important in highlighting those grievances which were not thereby excluded. This excepted from the grievance machinery "paragraphs 1, 2, 3, and 5 of the Management Rights Provisions * * * and paragraphs 1 and 3 of the No Strike and No Lockout Provisions."

This left paragraph 4 of management rights provisions and paragraph 2 of the no strike and no lockout provisions still subject to the grievance process. The former, (par. 4) prescribed that "Subject to the provisions of this Agreement the Company shall have the right to demote, suspend, discipline, or discharge for just cause, * * * employees because of lack of work or other legitimate reason." More significant, paragraph 2 of the no-strike-no-lockout provisions prescribed that "2. Any employee or employees who violate(s) or do not comply with the foregoing Section I shall be subject to discharge."

This brings into play Article XIV which provides "1. In the event an employee has been discharged, and

. . . U.S. . . . . at . . . [11 L.Ed. 680, at 685].

he feels he has been unjustly dealt with, such discharge may be submitted as a grievance * * *." We can assume that the Employer is correct that neither the Employer nor Union has any right to demand arbitration of a controversy concerning whether there has been a strike, picketing, stoppage, slowdown, sitdown, stayin, or other curtailment or interference with work on the part of employees or a lockout on the part of the employer.[7] But if a discharge resulted from either strike or work stoppage on the union's part of a lockout by the employer, the contract plainly recognized that this dispute was open for arbitration. And certainly, whatever arguments might be mustered for a contrary result, the purpose to exclude a grievance over discharge flowing from a work stoppage is not so clear as to permit a court, under the guise of contract construction, to invade that territory now reserved to the arbitrator. *United Steelworkers v. American Mfg. Co.*, 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 1960, 363 U.S.

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[7]This would eliminate the oftentimes vexing question in a suit by the employer against the union, or union against the employer, for damages resulting from an unauthorized strike or lockout, whether that controversy had to be submitted to arbitration. This problem is exhaustively treated in Drake Bakeries v. Local 50, 1962, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474. Cases denying a stay pending arbitration are collected in Drake Bakeries v. Local 50, 2 Cir., 1961, 287 F.2d 155, 158 n. 4. In the Supreme Court opinion in *Drake Bakeries*, 370 U.S. 254, 264 n. 12, Vulcan-Cincinnati, Inc. v. United Steelworkers, 6 Cir., 1961, 289 F.2d 103, is added to this list. The Court, 370 U.S. 254, 265 n. 14, also noted decisions in which damage suits have been stayed. Signal-Stat Corp. v. United Electrical, R. & M.W., 2 Cir., 1956, 235 F.2d 298; Yale & Towne Mfg. Co. v. International Ass'n of Machinists, 3 Cir., 1962, 299 F.2d 882, 883-84 n. 5.

593, 80 S.Ct. 1358, 4 L.Ed.2d 1424; *Lodge No. 12 v. Cameron Iron Works, Inc.*, 5 Cir., 1961, 292 F.2d 112; *Local Union No. 253; Taft Broadcast. Co. v. Radio Broadcast Tech.*, 5 Cir., 1962, 298 F.2d 707; *International Ass'n of Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F.2d 238, 5 Cir., 1963, 316 F.2d 90.

The case is one, therefore, for arbitration, and there being no doubt that the Employer has purposefully denied the duty to arbitrate, it is plain that an appropriate injunctive order should be entered. That being so, we are faced directly with the problem whether the pendency of the unfair labor practice charges before the Labor Board afford any basis for denial of this relief.[8]

At the outset, we should emphasize that the issuance of a mandatory injunction to proceed with arbitration is not necessarily the end of it. This being an equitable proceeding, the trial court should retain jurisdiction over the case so long as reasonably required. When the arbiter's award has been rendered and perhaps the Labor Board decision announced, appealed, enforced, or vacated, the trial Court can see on the basis of facts actually developed in each of the proceedings—not the mere allegations of lawyers—whether, and to what extent, there is any real conflict between private arbitration and public labor law enforcement.

[8]Routine greivance No. 69 through 74, with the possible exception of No. 70, are all unrelated to the lockout or resulting discharge and no possible justification for denying arbitration as to these has been put forward.

Proceeding with the arbitration will not disrupt or interfere with the Labor Board case. As a matter of fact the Board hearing, a very extensive one, has already been held. So far as cost or inconvenience of producing like or similar evidence before the arbiter is concerned, no policy defined in the Labor Act affords any immunity to the parties to an arbitration agreement. Also, from a factual standpoint there is only a limited similarity between the complaints pending before the Board and the principal one sought to be arbitrated. And as to this controversy over the discharges, the problems are not at all alike. The Union's brief points out well that the Employer for the most part labors under the fallacy of assuming that by the Board proceeding and arbitration, the Union is seeking to enforce a single right in two forums. Actually, there are quite separate rights involving separate legal and factual issues. In the arbitration proceeding, the Union is seeking to enforce the *contractual* right of employees not to be discharged "unjustly."[9] On the other hand, what is at issue in the Labor Board proceeding is the statutory rights of employees not to be discharged because of their union membership or because of anti-union discriminatory purposes on the employer's part. Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate

[9]That paragraph 2 of Art. XIV, Discharge, prescribed the remedy of reinstatement with back pay "in the same manner as provided under the Labor Management Relations Act of 1947" hardly makes a "federal" or "Labor Board" case. This merely eliminated another hurdle to effective arbitration. See Refinery Employees Union v. Continental Oil Co., 5 Cir., 1959, 268 F.2d 447, cert. denied, 1959, 361 U.S. 896, 80 S.Ct. 199, 4 L.Ed.2d 152; Lodge No. 12 v. Cameron Iron Works, 5 Cir., 1961, 292 F.2d 112.

contractual disputes. *Sinclair Refining Co. v. NLRB*, 5 Cir., 1962, 306 F.2d 569, 576-78. In addition, although the charge sets the machinery in motion, once the complaint is issued the Board proceeding takes on a public character in which remedies are devised to vindicate the policies of the Labor Act, not afford private relief to employees. *National Licorice Co. v. NLRB*, 1940, 309 U.S. 350, 362-63, 60 S.Ct. 569, 84 L.Ed. 799; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 1940, 309 U.S. 261, 265, 60 S.Ct. 561, 84 L.Ed. 738.

It takes no great imagination to envisage various decisions by Board or arbiter which, if standing alone, would deny all merited relief to the employees whereas the deficiency would be eliminated by a dual or parallel prosecution. Even more important, apart from the inconvenience or expense of a dual presentation of evidence, there seems little likelihood that any action of the arbiter could ever interfere with or frustrate any order of the Board in this case. If the Board concludes that the discharges were violations of the Act, reinstatement with back pay would follow as a matter of course regardless of the presence or absence of "justifiable" cause under the contract. If the arbiter concludes the discharges were contractually unjustified, the policy of the Labor Act is in no way impinged even though the Board might hold on its record that there was no violation of the Act warranting a reinstatement and back pay order.

Of course the law is neither so inflexible nor unrealistic as to foreclose at this early developing stage the possibility that there may be circumstances in which the rightful, exclusive, primary jurisdiction of the Labor Board over a particular controversy forbids the commencement or continuation of a §301 compelled arbitration. Though recognizing this possibility, *Smith v. Evening News Association*, 1962, 371 U.S. 195, 197, 83 S.Ct. 267, 9 L.Ed.2d 246, and *Carey v. Westinghouse Electric Corp.*, 1964, 375 U.S. 261, ___ S.Ct. ___, 11 L.Ed.2d 320, nonetheless permits a §301 damage suit and arbitration, respectively. The principles and practices in our earlier *Lodge No. 12 v. Cameron Iron Works*, 5 Cir., 1958, 257 F.2d 467, 472-73, have thus been substantially approved. And what is ordered here substantially parallels that approved in *Local Union No. 702 v. Central Illinois Public Serv. Co.*, 7 Cir., 1963, 324 F.2d 920; *Local 396, IBT v. Hurst*, S.D.Calif., 1962, 206 F.Supp. 594; *Local 410, Retail Clerks v. Sears Roebuck Co.*, N.D.Calif., 1960, 185 F.Supp. 558.[10] The latter two Courts cite our *Cameron Iron Works* case 5 Cir., 1958, 257 F.2d 467, with approval.

Nothing put forward by the Employer below or here justifies its refusal to go on with the arbitration. For

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[10]Kentile, Inc. v. Local 457, United Rubber Workers, E.D.N.Y., 1964, ... F.Supp. ... [55 LRRM 3011], reflecting facts bringing into play the accepted principle that an arbiter's decision may never justify *violation* of the Act, Sinclair Refining Co. v. NLRB, 5 Cir., 1962, 306 F.2d 569, at 574, is certainly not to the contrary.

the entry of appropriate orders and further consistent proceedings,[11] the cause must therefore be remanded.

REVERSED AND REMANDED.

[11]The record shows a right to arbitration, a timely or excused demand and a flat refusal by the Employer for reasons not legally sufficient. We perceive of no fact questions but leave this to the handling of the District Judge through summary judgment or otherwise to excise any fact genuinely in controversy for partial trial without delay. Arbitration is often a catalyst in labor peace because of its speed. Lodge No. 12 v. Cameron Iron Works, 5 Cir., 1961, 292 F.2d 112; Sinclair Refining Co. v. NLRB, 5 Cir., 1962, 306 F.2d 569.